IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 569

In The Matter of General Stores Corporation,
Debtor.

LEWIS J. RUSKIN, AS TRUSTEE UNDER COLLATERAL AGREEMENT DATED MAY 19, 1954,
Petitioner,

vs.

CHARLES H. GRIFFITHS, TRUSTEE IN REORGANIZATION OF GENERAL STORES CORPORATION, Debtor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Respondent.

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Lewis J. Ruskin, as Collateral Trustee under a Collateral Trust Agreement dated the 19th day of May, 1954, made with General Stores Corporation, prays that a Writ of Certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit as affirmed the order of the United States District Court for the Southern District of New York denying said Petitioner's claim for lien for services as Collateral Trustee and expenses, including legal fees, in excess of the amounts fixed by the District Court.

Opinions Below.

The opinion of the District Court (R. 339a)* is reported at 164 F.Supp. 130. The opinion of the Court of Appeals (Appendix, *infra* p. 27) is reported at 269 F.2d 827.

Jurisdiction of This Court.

The judgment of the Court of Appeals was entered on August 26, 1959. Petitioner's application timely presented on November 24, 1959, for extension of time until December 15, 1959 to file his petition was granted by Mr. Justice Harlan on November 26, 1959. The jurisdiction of this Court is conferred by Sections 1254(1) and 2101(c) Title 28, U. S. Code, and Sections 121 of Chapter X and 24(c) of the Act of Congress Relating to Bankruptcy (11 U.S.C., Secs. 521, 47).

QUESTIONS PRESENTED.

1. Where a plan of reorganization (under Chapter X of the Act of Congress Relating to Bankruptcy), providing for payment in full in cash of the sums owing by virtue of valid lien provisions in a debtor's security agreement and thereby dispensing (under Section 216(7) of said Act) with the need for consent to such plan of the secured creditors, has been approved and confirmed without such consent, may the Court of Appeals in reviewing, and the District Court in fixing, the amount of the Collateral Trustee's lien under such agreement for compensation to him and his attorneys thereunder,—a purely judicial question,—rely heavily upon, be guided by or be obliged to accept, in the absence of "reasons otherwise based on specific findings," the recommendation of the Securities and Exchange Commission?

2. May they do so, where under the Act (Section 208, Chapter X; 11 U.S.C. Section 608) the Securities and

*All record page references are to the pages in the Appendix of Appellant in the court below.

Exchange Commission may only intervene, and has intervened and participated, in the proceeding as a "party in interest", and the other provisions in the Act (Sections 172, 173 and 265; 11 U.S.C. Sections 572, 573 and 665) are only for notice to it and its advisory report on a plan?

3. As the determination of the amount of a lien not affected by, and to be paid in full under, a plan of reorganization is no more than the equivalent of a recovery by the holder of the lien in a foreclosure of the lien or payment by the debtor for redemption, is it not a deprivation of due process under the Fifth Amendment to the Constitution of the United States to require the Reorganization Court to follow the recommendations of the Securities and Exchange Commission where, in its status as "a party in interest", it has assumed a position adversary to that of the lienholder, or where it has not published regulations providing standards for its delegated personnel in the performance of the Commission's functions, or where no opportunity is accorded to subject the Commission's recommendations to cross-examination?

4. Is the practice of having a Reorganization Court rely heavily upon, be guided by or be obliged to accept, in the absence of "reasons otherwise based on specific findings," the recommendation of the Securities and Exchange Commission in fixing an allowance of fees under Sections 241-243 of the Act (11 U.S.C. Secs. 641-643) applicable to the Court's determination of amounts payable under the debtor's security agreement and secured fully by the property pledged thereunder and which the debtor's confirmed plan of reorganization has agreed to pay in full in cash?

5. Where the Collateral Trustee is vested with possession and control of the debtor's stock in its wholly

owned solvent operating subsidiaries, are his trust and fiduciary obligations limited to the security of the noteholders or do they encompass a duty to the debtor as well, so that his compensation, and the lien therefor, should include also his services in the prudent and profitable management of the subsidiaries to the debtor's benefit, particularly where the debtors' Reorganization Trustee has not assumed the duties of such management or operation?

STATUTE INVOLVED.

The case involves the following sections of Chapter X the Bankruptcy Act:

Section 172 (52 Statutes 890, 11 U. S. C, Section 572) which reads as follows:

> "After the hearing, as provided in section 169 or section 170 of this Act, and before the approval of any plan, as provided in section 174 of this Act, the judge may, if the scheduled indebtedness of the debtor does not exceed $3,000,000, and shall, if such indebtedness exceeds $3,000,000, submit to the Securities and Exchange Commission for examination and report the plan or plans which the judge regards as worthy of consideration. Such report shall be advisory only."

Section 173 (52 Statutes 891, 11 U.S.C. Section 573) which reads as follows:

> "The judge shall not enter an order approving a plan submitted to the Securities and Exchange Commission until after the Securities and Exchange Commission has filed its report thereon or has notified the judge that it will not file a report, or until the expiration of such reasonable time for the filing of such report as the judge has fixed, whichever first occurs."

Section 208 (52 Statutes 894, 11 U.S.C. Section 608) which reads as follows:

> "The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding."

Section 265 (52 Statute 903, as amended by July 7, 1952, ch. 579, § 28, 66 Stat. 431; 11 U.S.C. Section 665) which reads as follows:

> "a. In addition to the notices elsewhere expressly provided, the Securities and Exchange Commission shall be given notice of all other steps taken in connection with a proceeding under this chapter. Any notice which this chapter requires to be given to the Securities and Exchange Commission shall be deemed to have been sufficiently given if it is given by registered first-class mail, postage prepaid, addressed to the Securities and Exchange Commission at Washington, District of Columbia, or at such other place as the Securities and Exchange Commission shall designate by written notice filed in the proceeding and served upon the parties thereto. The clerk and, in the case of a reference, the referee after such reference, shall forthwith transmit to the Securities and Exchange Commission copies of (1) every petition filed under this chapter; (2) the answers thereto, if any; (3) the orders approving or dismissing peti-

tions; (4) the orders appointing trustees or continuing debtors in possession; (5) the orders determining the time within which the claims of creditors may be filed and allowed, and the division of creditors and stockholders into classes according to the nature of their respective claims and stock; (6) the orders approving any plan or plans, together with copies of such plans; (7) the orders approving alterations or modifications in plans, together with copies of such alterations or modifications; (8) the orders confirming plans, together with copies of such plans; (9) all applications for allowances for compensation and expenses, and the orders making or refusing to make such allowances; (10) the orders adjudging debtors to be solvent or insolvent; (11) the orders directing that bankruptcy be proceeded with, or adjudging the debtor bankrupt and directing that bankruptcy be proceeded with, or dismissing proceedings; (12) and such other papers filed in the proceedings as the Securities and Exchange Commission may request or which the court may direct be transmitted to it. Copies of the opinions or reports, if any, of the judge, referee, or special master, with respect to the matters enumerated, shall also be transmitted to the Securities and Exchange Commission.

"b. The provisions of section 4 (b) of the Securities and Exchange Act of 1934 shall be applicable with respect to the power of the Securities and Exchange Commission to appoint and fix the compensation of such officers, attorneys, examiners, and other experts, and such other officers and employees, as may be necessary for carrying out its functions under this chapter."

STATEMENT OF THE CASE.

The proceeding below is a reorganization proceeding under Chapter X of the Bankruptcy Act (11 U.S.C. sec. 501 *et seq.*; ch. 575, 52 Stat. 883).

Petitioner, Lewis J. Ruskin, ("Ruskin") is Collateral Trustee under an agreement dated May 19, 1954 (the "Collateral Agreement") between himself and the Debtor. He held all of the capital stock of Ford Hopkins Company ("Ford") and Stineway Drug Company ("Stineway") as collateral to secure the Debtor's indebtedness to himself and Rexall Drug Company. This secured indebtedness, at the time of the reorganization, aggregated $2,050,000 plus interest, compensation and expenses.

The plan of reorganization, as amended, (the "Plan") provides in Article IV(D) that Ruskin was to "be paid in full in cash." The order of Court approving the Plan stated that as Ruskin was to be paid in full in cash, there was no need to secure his approval to the Plan. (Bankruptcy Act, Section 216(7), 11 U.S.C.A. Section 616(7)). The "full compensation" relevant here relates to the following provisions of the Collateral Agreement, which sets forth the rights and obligations of the parties in the collateral, giving Ruskin a prior lien for compensation for his services and expenses, including legal fees (Article VIII, Section 1, (2), (3), (9), (R. 24a):

> "Section 1. The Trustee accepts the trust of this Collateral Agreement upon the following terms and conditions to which General (the Debtor) and the holder and holders of the Notes secured hereby agree:
>
> • • •

"(2) The Trustee shall be entitled to reasonable compensation for all services rendered in the execution of the trusts hereby created, to be paid, for services prior to the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof by the holders of the Notes ratably, and for services after the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof, by General; and for such payment, the Trustee shall have a lien on the Trust Estate and all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes.

"(3) The Trustee may employ agents, attorneys and counsel in the execution of said trusts, who may also be the attorneys and counsel of the holder or holders of said Notes, and of Ford and Stineway, or their successors, or any one or more of them, and the reasonable compensation of the Trustee's attorneys and counsel and of any other person as the Trustee may employ in the administration and management of the trusts hereunder, and all other reasonable expenses necessarily incurred or actually disbursed hereunder, General agrees to pay to the Trustee on demand; and for such payment, the Trustee shall have a lien on the Trust Estate, and on all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes.

• • •

"(9) In case of any dispute, controversy, suit or proceeding regarding the Trust Estate held by the Trustee hereunder, or any part thereof, or regarding this Collateral Agreement, or any provision thereof, or regarding the Trustee or any action or non-action of the Trustee, it is understood and agreed the Trustee shall have a lien on said Trust Estate for any and all costs, attorneys' and solicitors' fees and other expenses which the Trustee may have reasonably in-

curred or become liable for on account thereof, or in any way by reason of this Collateral Agreement; and the Trustee shall be entitled at his option to reimburse himself therefor out of said property, or out of any funds or property in his possession belonging to General, and General agrees to pay to the Trustee upon demand all such costs, fees and expenses."

The Securities and Exchange Commission ("Commission") whose position has been adverse to Ruskin throughout the proceeding made the following recommendations respecting compensation for Ruskin's services: those rendered to Ford and Stineway were not compensable from the collateral; only those rendered as Trustee were compensable out of the collateral; these were nominal and $6,000.00 per annum was reasonable compensation for such services. (R. 143a) The evidence was that the minimum reasonable value of Ruskin's services in running Ford and Stineway and as Trustee was $35,000.00 per year. (R. 90a, 161a, 162a) The Reorganization Trustee's own expert indicated that a substantial part of the value of Ford and Stineway was attributable to Ruskin's skill and vigor in running them. (R. 158a) The District Court allowed Ruskin $6,000.00 per year for the period from Debtor's default October 18, 1954 until the Chapter X proceedings commenced on April 30, 1956 and $9,000.00 per year thereafter. The Court of Appeals, in affirming, said it:

> "would be less than wise if it did not rely heavily for guidance in such matters upon the SEC . . ." (*infra* Appendix p. 38).

The Commission recommended $60,000.00 as a lien for attorney's fees for services from October 18, 1954 until December 15, 1957. The evidence was that the reasonable minimum amount of fees for these services was $180,000.00. The District Court fixed as the amount of

the lien for attorney's fees the amount of the Commission's recommendation. It felt obliged to give the Commission recommendations "the greatest weight" (R. 332a) and cited and quoted as its authority *Scribner & Miller* v. *Conway*, 238 F.2d 905, 907 (2d Cir. 1956), reaffirming that Court's principle of law established in *Finn* v. *Childs*, 181 F.2d 431,

> "that the recommendations for allowances of the Security and Exchange Commission . . . should be followed unless the reorganization judge showed reasons otherwise based on specific findings."

The Court of Appeals, in affirming, followed its ruling in *Finn* v. *Childs*.

Ruskin's Services.

The Debtor purchased all of the stock of Stineway in August, 1953. Prior to the purchase, Stineway had been run by its President, Henry Stine. After the purchase, Colonel Earl, President of Debtor, was elected a director of Stineway, and ran its business, notwithstanding that Henry Stine continued as President (R. 111a).

The Debtor purchased all of the stock of Ford in May, 1954. Prior to the purchase, Ruskin had run the business of Ford for approximately thirty years, the last fifteen while residing away from Chicago, and for the preceding three years, while living in Scottsdale, Arizona. His salary in the three years prior to 1954 ranged from $35,000 to $45,000 per year (R. 161a).

To secure the balance of the purchase price for Ford stock, Debtor transferred all of the Ford and Stineway stock to Ruskin, the Collateral Trustee, with all voting rights. Ruskin was elected director and Chairman of

the Board of Ford and continued in such capacity continuously until July 21, 1958, when the Reorganization Court ordered payment to Ruskin and termination of the Collateral Trusteeship. At the time of Debtor's purchase of Ford's stock, Debtor had withdrawn from Stineway amounts in excess of Debtor's purchase price of Stineway's stock, and Stineway thereafter depended upon Ford's management, credit and direction to continue in business (R. 148a).

After Debtor's purchase of the Ford stock, members of the Stine family who respectively had been its President, Executive Vice-President, Vice-President, and various department heads theretofore active in Stineway's management, severed their connection with the company. Ruskin was left to run Stineway as well as Ford.

Soon after Debtor's purchase of the Ford stock, Earl and Ruskin undertook to find and engage a chief executive for the integrated business of Ford & Stineway. A firm of industrial engineers was consulted for assistance in finding qualified persons (R18a, 132a). In the meantime, persons from lower ranks, who were engaged in certain departmental activities, were made Presidents of Ford and Stineway. However these persons, as well as all other executives, relied upon and executed Ruskin's directions (R55a, 57a, 68a, 69a, 136a).

The Debtor voluntarily filed a petition under Chapter XI in October, 1954. By that proceeding Debtor's financial instability and the impairment of Stineway's capital due to the Debtor's cash withdrawals were made public knowledge. Ruskin and Earl were obliged to abandon their search for a chief executive; and, there being no one in either business with the necessary top leadership experience, Ruskin himself, thereafter assumed command of the two companies (R 114a-115a, 116a-117a). Earl consented to this (R 130a).

Ruskin was a conscientious, painstaking, and effective commander-in-chief. Since October, 1954, when the Debtor instituted court proceedings, Ruskin devoted all his energy to the two companies (R 127a-129a); he has not engaged or been employed in any other business or venture, and has received no compensation from any other source (R 90a). The Reorganization Trustee, it should be noted, has taken almost no part in the direction or management of Ford and Stineway.

Ruskin drew no compensation from Ford or Stineway. He did not wish to create any possible conflict of interest in discharging his duties as Collateral Trustee by appropriating compensation from the subsidiaries. He chose to await the ultimate fixing of his compensation as Collateral Trustee for all of his services (R 356a, 359a).

Legal Services.

When the Debtor advised Ruskin in October of 1954 it was filing a petition under Chapter XI, he retained Ruskin and Rosenbaum, attorneys of Chicago, Illinois, where Ford and Stineway have their executive offices, to protect his trust interests. Debtor sought a commitment from Ruskin not to accelerate the indebtedness. Before Debtor's petition was filed, Ruskin advised the Debtor he would agree to a nine-month standby, but only if made in writing. After an exchange of drafts between attorneys, Ruskin entered into a letter of agreement dated November 1, 1954 not to foreclose upon the indebtedness prior to July 17, 1955, unless certain specified events—including the filing of a Chapter X petition—occurred. This agreement expressly reserved all other rights of Ruskin and the holders of notes secured by the Collateral Agreement ("Noteholders").

The Commission and a stockholder of Debtor intervened in the Chapter XI proceedings and moved for its dismissal unless the Debtor filed a petition under Chapter X. The motion was granted by the District Court. This Order was affirmed by the Court of Appeals for the Second Circuit on April 14, 1955 and by this Court on March 26, 1956.

In June, 1955 the stand-by agreement of November 1, 1954 was extended to August 16, 1955, and the Debtor was informed that no further extensions would be granted. Requests for further extensions were refused. On August 17, 1955, after having advised Debtor's officials of their intention so to do, Ruskin and the Noteholders accelerated the indebtedness and declared the entire principal due and demanded payment thereof.

Debtor's officials requested Ruskin not to foreclose, stating they were negotiating various merger possibilities with a view to paying the secured debt. Later, they informed Ruskin they were negotiating with a Mr. Richard Goodman who allegedly had the money to pay the secured debt. Goodman had, until that time, been uninterested in the Debtor. Only then did he acquire Debtor's stock; and, ultimately in 1956 substantially all the unsecured claims against it. In December, 1955 Goodman stated to Ruskin he would pay the indebtedness in full. Goodman made several proposals which he was to put in writing. This he never did (R. 106a, 86-87a).

In April, 1956 one of Goodman's associates advised Ruskin that Goodman's loan commitment had fallen through and that Goodman would use Chapter X proceedings as a means of delay. Ruskin forthwith served the Debtor with notice of foreclosure.

The Debtor is a New York corporation with offices in New York and the proceedings under both Chapter XI

and Chapter X have been in the United States District Court for the Southern District of New York. Ruskin required local counsel to represent him in such proceedings—especially after he learned that a stay of foreclosure would be sought in the contemplated Chapter X proceedings.

On April 25, 1956, Ruskin retained the firm of Paul, Weiss, Rifkind, Wharton & Garrison, of New York, to represent him jointly with the firm of Ruskin and Rosenbaum. On April 30, 1956, the debtor filed its amended petition to comply with the requirements of Chapter X of the Bankruptcy Act. The amended petition was approved May 1, 1956, and Ruskin was enjoined from foreclosing upon the collateral.

Goodman promised the Reorganization Trustee on several occasions to produce a plan which would provide for the full payment of the secured debt; but failed to do so (R. 44a-46a). When no plan was forthcoming, Ruskin's attorneys moved to vacate the stay against foreclosure on November 9, 1956. On January 3, 1957, the District Judge filed his opinion denying without prejudice the petition to vacate the stay, with leave to renew if no feasible plan was produced within the period fixed by the Court. The period was extended on the request of the Commission.

On the eve of the expiration of this extended period, three full months later, Goodman, for the first time, made a concrete offer but filed a proposal which was unacceptable to Ruskin as well as to the Reorganization Trustee. Ruskin's attorneys filed a renewed petition on April 11, 1957 to vacate the stay.

To meet this renewed petition, Goodman and the Reorganization Trustee renegotiated the plan, in which negotiations the Commission participated. The Court again

denied without prejudice Ruskin's renewed petition to vacate the stay and fixed a date within which the Reorganization Trustee should file a plan or state he was unable to do so.

The Reorganization Trustee, on May 15, 1957, the date fixed by the Court, filed a plan of reorganization, on which hearings began on June 18, 1957 and concluded October 8, 1957. The plan of May 15, 1957 provided for only partial payment of the secured debt and a 7-year moratorium on the unpaid balance of approximately $670,000.00, a reduction in the interest, the cancellation of the Collateral Agreement, the management of Ford and Stineway by the Debtor, a compulsory dividend by Ford and Stineway to pay a portion of the funds required under the plan, and the recovery of $142,696.08 allegedly due from Ruskin, likewise to be used as part of the funds required under the plan.

The Reorganization Trustee testified at the plan hearing that the plan was the best that Goodman told him he was able to make, and it was the only semblance of any proposition the Reorganization Trustee had received (R. 47a). Ruskin's attorneys vigorously opposed the plan at the hearings as unfair, inequitable and unworthy of consideration. At the conclusion of the hearing the Court expressed doubt that the plan, as proposed, was equitable (R. 108a-c) and appeared concerned as to whether it was worthy of consideration.

In the meantime, Ruskin's attorneys had appealed to the Court of Appeals from the Reorganization Court's order denying Ruskin's renewed petition to vacate. This was set for argument on December 4, 1957. On the eve of oral argument Mr. Goodman agreed to an amendment to the plan to provide for payment in full of all money

due Ruskin under the Collateral Agreement, and to the elimination from the plan of any claim against Ruskin for the $112,696.08.

Adversary Position of the Commission.

Only private rights were involved in the proceedings. The Commission in its motion to intervene in the Chapter XI proceeding and to require the Debtor to either dismiss or amend to a Chapter X proceeding stated that the Debtor has outstanding in the hands of the public 2,232,422 shares of common stock, listed upon the American Stock Exchange, and that the interests of this "investing public" were not represented, and that

> "The adequate representation of these interests requires that the Commission be permitted to intervene for the purpose of taking all such steps as may be appropriate for their protection in this proceeding." (*General Stores Corporation* v. *Max Shlenskn*, 350 U.S. 462, 76 S.Ct. 516, Record, pp. 7a, 30a)

At no time did any proposed plan call for the issuance to the public of any additional stock. The additional stock for additional funds was to be issued only to Goodman and his associates for cash required to finance the Plan. The Commission was, therefore, concerned throughout with preserving the rights of these public stockholders, which rights were junior to those of Ruskin. To the extent and while anything but payment in full in cash was proposed, the rights of these public stockholders were in direct conflict with the interests of Ruskin.

Early in the Chapter X proceedings, the Stockholders' Committee and a stockholder intervened to represent the interests of stockholders. Goodman, then holder of substantially all unsecured claims and also a large block of Debtor's stock, intervened and was represented by New York and Chicago counsel, and also appeared *pro se*. The

Commission allied itself with the Reorganization Trustee and the junior interests in opposing Ruskin in the proceedings.

On the hearing on Ruskin's first application to vacate the stay of foreclosure, the Trustee, Goodman and all junior interests opposed Ruskin. So did the Commission. All filed briefs, including the Commission, in opposition.

On the hearing of Ruskin's renewed petition to vacate the stay, Ruskin was again opposed by the Reorganization Trustee and all junior interests. The Commission attorney likewise opposed Ruskin's application.

During the hearings on the Plan, one issue was the claimed offset by the Reorganization Trustee against Ruskin in the sum of $112,696. The Commission attorney allied himself actively with the Reorganization Trustee in seeking to establish this offset. This claim for offset was eventually abandoned by the Reorganization Trustee.

During the Plan hearings Goodman, the Commission and Reorganization Trustee took the position that Ruskin had participated and colluded with the Debtor in the filing of the Chapter XI proceedings and was estopped to declare it a default and had waived such default by his conduct. They sought to establish thereby that the debt secured by the collateral was not due and also that interest was not due at the post-maturity rate. The Commission also contended that Ruskin was not entitled for this reason to any compensation until November, 1956, when his first application to vacate the stay was filed (R. 142a, 143a). The Court held the filing of the Chapter XI petition was a default and there was no waiver by or estoppel against Ruskin (R. 306a, 307a).

The Reorganization Trustee and the Commission at the hearings also made an issue out of an alleged claim

that substantially $500,000 of moneys were available to be withdrawn from Ford and Stineway by Ruskin to apply on the secured debt and that, therefore, interest was not allowable at all with respect to the moneys so available. This position was taken notwithstanding the need of Ford and Stineway for cash, and funds to establish self-service drugstores in view of the trend at the time away from conventional stores (R. 315a).

At the conclusion of the Plan hearings, Ruskin contended the plan was not to be submitted to the Commission if not found by the Court worthy of consideration. The Commission attorney opposed Ruskin's position. The plan was not submitted to the Commission until after it was amended to provide full payment of the secured debt.

On the appeal from the refusal of the Reorganization Court to vacate the stay on the renewed application, the Reorganization Trustee, Goodman and all junior interests filed briefs and argued in opposition to Ruskin. The Commission likewise filed a brief and argued in opposition to Ruskin.

In the summer of 1957, Goodman procured an injunction from the Reorganization Court restraining Ruskin and Ford and Stineway from making any capital expenditures except upon the approval of the court in the event of the Reorganization Trustee's opposition thereto. Ruskin and Debtor's subsidiaries appealed from this injunction order to the Court of Appeals. Here, too, the Reorganization Trustee, Goodman and the junior interests opposed Ruskin, and so did the Commission.

After approval of an amended plan providing for full payment in cash to Ruskin, he petitioned the Reorganization Court to establish the amount of his lien upon the collateral held by him for principal, interest, Trustee's compensation and expenses, including

attorneys' fees. Various executives of Ford and Stineway testified at the hearing on this petition. Ruskin and his attorneys also testified with regard to their services. The Commission attorney cross-examined all of these witnesses. Later, after conclusion of the hearing, the Reorganization Court heard oral argument on Ruskin's petition. The Reorganization Trustee, Goodman and all other stockholder interests made oral arguments in opposition to Ruskin's petition. The Commission did likewise, and in addition, suggested specific amounts for Ruskin's compensation and expenses, including attorney's fees. These oral suggestions are the Commission's recommendations here involved.

REASONS FOR GRANTING THE WRIT.

1. The issues presented involve Federal questions of law of great importance in the administration of reorganization proceedings under Chapter X of the Bankruptcy Act.

(a) *The Decision Below Reads into Chapter X a Fact-Finding Status for the Commission which is In Conflict with the Intent of Congress.* The right of the Commission to become "a party in interest" (Section 208; 11 U.S.C. 608) would preclude any construction that Congress intended the Commission to have any fact-finding status with regard to the extent of a valid lien for fees and expenses. Congress could not have intended to permit the Commission to become both a litigant and a body exercising a judicial function in the same case without expressly saying so.

Particularly is this so, when it is observable that in chapter X Congress only provided for notices to the Commission and for an advisory report on a proposed plan deemed worthy of consideration (sections 265, 172, 173; 11 U.S.C. sections 665, 572, 573). Section 172 making the report "advisory only", finds its parallel in the

chancery practice with respect to advisory jury verdicts of which this court said in *Idaho & Oregon Land Co.* v. *Bradbury*, 132 U.S. 509, at page 516, that the trial court "was at liberty to disregard the verdict and findings of the jury, either setting them aside, or by letting them stand, and allowing them more or less weight in its final decree, *according to its own view of the evidence.*" (Emphasis ours.) To like effect see *Kohn* v. *McNulta*, 147 U.S. 238, 240.

If Congress has authorized specific action by the Commission to be advisory only, and hence not binding upon, or restrictive of, the Court in any manner, then, on any other action of the Commission in the proceedings on which Congress has not spoken, the view of the Second Circuit in according the greatest weight to Commission recommendations thereon would appear *a fortiori* to conflict with the intent of Congress.

Moreover, in statutes like the Securities Act of 1933, the Securities and Exchange Act of 1934, the Public Utility Holding Company Act of 1935, and the Trust Indenture Act of 1939, where Congress so intended, the Commission's findings of fact were expressly made conclusive if supported by evidence or substantial evidence (15 U.S.C. sections 77i(a), 77vvv(a), 78y(a), and 79x(a)), or its approval of a plan of reorganization required (15 U.S.C. sec. 79k(f)). Also, in railroad reorganizations, Congress specifically gave the Interstate Commerce Commission authority to make reports which should be *prima fa* evidence of the facts therein stated, and to fix the maximum limits for expenses and fees incurred in connection with the proceedings and plan. See *R.F.C.* v. *Bankers Trust Co.*, 318 U.S. 163, 170 (1943).

(b) *The Effect of the Decision Below Impairs the Judicial Function of the Reorganization Court.* By its requirement that the Reorganization Court follow the

recommendations of the Commission on fees and allowances unless for reasons otherwise based on specific findings, the Court of Appeals withdraws from the Reorganization Court its right and function to make its own findings of fact based upon its own judgment of the law and evidence and limits its function to that of review of administrative action.

The determination of the amount of a lien under a valid security agreement entitled to priority within the doctrine of *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 60 S.Ct. 1, (1939) and subsequent cases, is, in the absence of a contrary statutory restriction, entirely a judicial function. The Act does not delegate to the Commission any functions in determining the extent of the lien. The Act grants to the Reorganization Court exclusive jurisdiction. This provides for an adjudication of the extent of the lien, including Trustee's compensation, expenses and attorneys' fees, in the same way any competent tribunal in a proper venue would ordinarily do so, either in an action for foreclosure or one for redemption. There is no basis for any abdication or delegation by the Chapter X tribunal to the Commission of any part of the Court's function in determining the extent of a lien entitled to priority.

(c) *The Commission has Established No Standards for Its Personnel to Deal with such Judicial Functions.* Standards have not been promulgated by the Commission, nor by its Chairman under the 1950 Reorganization Plan No. 10 (15 U.S.C. 78d note). See 17 Code of Federal Regulations, Part 281. The inconsistency and variability of the Commission's position in reorganization proceedings was demonstrated in the proceedings below on the interest question. In the District Court it adopted the view that the 6% rate was applicable. In the Court of Appeals, on appeal the Commission reversed itself

and opposed the 6% rate. However, in *Newman & Bisco, et al.* v. *Realty Associates Securities Corp.*, 173 F.2d 609, 612 (2nd Cir. 1949), it appears the Commission favored a post-maturity interest rate at a 6% legal rate higher than the contract rate. Moreover, the Commission sought to justify its opposition to the 6% rate in the Court of Appeals below on an extension of the principle of *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946). This it did in the face of the fact that the Debtor in these proceedings was solvent, and in the case of *In re International Hydro-Electric System*, 101 F. Supp. 222 (D.C. Mass. 1951), the Commission had approved a plan for a solvent utility company providing for payment of interest on interest to the secured creditors, distinguishing *Vanston* as inapplicable to solvent situations.

2. The decision of the Court below raises a serious constitutional question as to whether the right of an adversary party in a proceeding to make recommendations on issues in the case is not a denial of due process.

The Commission as a party in interest had in prime view the public stockholders of the Debtor and the sufficiency of the Debtor's net worth and financial structure after reorganization. This concern of the Commission brought it into conflict, throughout the proceedings below, with the priority secured creditors whose priority the confirmed Plan explicitly recognized. The Commission, as an adversary litigant, found itself in various aspects of the litigation in conflict with the Collateral Trustee. The Commission, accordingly, was not an impartial government agency impartially informing the Court.

It may be proper in the determination of fees compensable under Chapter X (Sections 241-243; 11 U.S.C. 641-643) for the Court to consider what is a proper total to be allowed out of the Debtor's assets for such compensation and allocating this among those whose services

qualify under the Act and its standards for compensation. This purpose, according to *Finn* v. *Childs*, 181 F.2d 431, at 435-6, could be served by the Commission.

But this does not justify making use of the Commission for the purpose of determining the extent of a contractual lien for fees not affected by the reorganization and provided to be paid in full by a plan of reorganization.

For this purpose, the measure of the reasonable amount payable is determinable on the basis of customary equitable standards and not any question of proper totals to be allowed out of Debtor's assets for compensation. Nor is it proper that the Commission, whose only public interest was in that of a junior class with which it was allied, should be permitted to make recommendations carrying more weight than such junior class or any other party litigant. To cast the Commission in the role of making binding recommendations with respect to compensation to be paid under a lien to its adversaries violates principles of justice inherent in the Fifth Amendment. The judgment of the Court of Appeals fetters the Court's discretion with an obligation to follow an adverse party's recommendation unless shown by specific findings of fact to be erroneous. This deprives the lien claimant of his right to an impartial judicial determination in the only forum allowed him by law and, in effect, to subject him to a biased view, however well motivated, of an adverse party. An adverse party is entitled to be heard but not to have advance credence given to his contentions presented in the form of recommendations.

The difficulty is especially emphasized in view of the fact that there are no standards or regulations published by the Commission to assure that the personnel making recommendations do so free from any influence of the

personnel taking an adversary role in the proceedings. Nor does the rule of the Court of Appeals below give a party a right to cross-examine into the basis and reasonableness of the Commission's recommendations.

3. The rule of the Court of Appeals, Second Circuit, is not uniformly the practice in other circuits in Chapter X proceedings.

The Courts of Appeals for the various circuits have not adopted the view of the Second Circuit with respect to the consideration to be given the Commission's reports on allowances for compensation under Sections 241-243 of the Act (11 U.S.C., Sections 641-643) for services in the administration of the debtor's estate or in effecting or successfully opposing a plan of reorganization.

The Second Circuit, in *Finn* v. *Childs*, 181 F. 2d 431, in establishing the rule that the Reorganization Court is obliged to follow the Commission's recommendations with respect to fees unless for other reasons based upon specific findings of fact, acknowledged at page 438, with citations to *Cooke* v. *Bowerstock* (8th Cir., 1941), 122 F.2d 977, 985, and *In re Detroit International Bridge Co.* (6th Cir., 1940), 111 F.2d 235, 237-8:

> ". . . Some courts have refused to give S.E.C. recommendations as to fees more weight than the . . suggestions of any other party. . . ."

The Third Circuit, in *In re Solar Mfg. Corp.* (1954) 215 F.2d 555, went no farther in its opinion than to say (p. 562) the S.E.C. opinion "is a very useful and proper guide."

In *In re Chicago Rys. Co.*, (7th Cir., 1947), 160 F. 2d 59, 69, even the advisory opinion of the Commission on a plan was said not to be evidence but only advisory, intended as an aid to the Court in the solution of many complicated financial and business problems involved.

In the case at bar, the doctrine of the Second Circuit with respect to reorganization fees (about which there is no uniformity and which is more extreme than that prevailing in other circuits) is even being extended to contractual liens upon pledged property, not only for which priority is provided by the "fair and equitable" requirements of the Act in any plan of reorganization, but also for whose payment in full the plan makes express provision.

It cannot be denied that in reorganization cases the Reorganization Court will often be called upon to fix the amount of the lien granted by security agreements and conveyances to secured creditors and their Trustee for compensation to the Trustee and his attorneys. The questions presented are, therefore, important in the administration of reorganizations under Chapter X of the Bankruptcy Act and for the assurance of a reasonable uniformity in the practice in the various circuits.

CONCLUSION

In view of these considerations, the Petitioner respectfully submits that this petition should be granted.

Respectfully submitted

HARRY H. RUSKIN
JOSEPH ROSENBAUM,
Attorneys for Petitioner.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 219—October Term, 1958.

(Argued March 11, 1959 Decided August 26, 1959.)

Docket No. 25317

In the Matter of
GENERAL STORES CORPORATION,
Debtor.

LEWIS J. RUSKIN, Collateral Trustee

v.

CHARLES H. GRIFFITHS, Trustee in Reorganization

Before:

WASHINGTON, WATERMAN, and MOORE,
Circuit Judges.

Appellant petitioned the U. S. District Court for the Southern District of New York to award him payments of interest and compensation from funds in its hands belonging to a debtor in reorganization under Chapter X of the Bankruptcy Act, claiming them to be due under a collateral trust agreement. This appeal is from an order, Levet, J., making awards of less than the amounts claimed. Opinion below reported at 164 F. Supp. 130. Reversed in part and affirmed in part.

PAUL, WEISS, RIFKIND, WHARTON & GARRISON; RUSKIN and ROSENBAUM (Simon H. Rifkind, Harry H. Ruskin, John E. Massengale, Irving Younger, of counsel), New York City, *for Appellant, Lewis J. Ruskin.*

FREDERICK P. CLOSE (Martin Drazen, of counsel), White Plains, New York, *for Trustee in Reorganization, Appellee.*

LOUIS J. WEINSHENKER (Edward A. Gorenstein, Walter Goodman, of counsel), New York, *for Richard Goodman, Stockholder.*

RICHARD GOODMAN, Stockholder, Chicago, Ill., *pro se.*

THOMAS G. MEEKER, General Counsel; David Ferber, Asst. General Counsel; Pace Reich, Melvin Katz, Attorneys, SEC; Richard V. Bandler, Special Counsel; Kiva Berke, Attorney, *for Securities and Exchange Commission.*

WATERMAN, *Circuit Judge*:

On May 19, 1954 Lewis J. Ruskin, his wife, and the Rexall Drug Company sold all the stock of a retail drug store chain known as Ford Hopkins Company to General Stores Corporation. The purchase price was $2,800,000, of which $735,000 was to be paid in cash and the balance by notes to Ruskin and Rexall payable in installments until 1964. As security for these notes all the stock of Ford Hopkins and all the stock of Stineway Drug Company, another drug store chain owned by General Stores, was transferred to Ruskin as trustee for himself and for Rexall under a "Collateral Agreement" entered into simultaneously with the execution of the notes. Ruskin, as trus-

tee under this agreement, had the right to elect a majority, or, after default, all the members of the Boards of Directors of these corporations. The notes were to accrue interest on principal at the rate of 4% per annum, but the collateral agreement provided that in case of an "event of default" as defined in that agreement the then total unpaid amount could be declared due and payable forthwith, and interest would then accrue upon overdue payments at the rate of 6% rather than at 4%. One "event of default" provided for in the agreement was as follows:

> "[I]f any proceedings before Control Date involving General or any subsidiary (other than Ford of Stineway) thereof or any successors thereto, and after Control Date involving General, Ford or Stineway or any subsidiary thereof or successors thereto, are commenced by or against such company under any bankruptcy, reorganization, arrangement, insolvency or readjustment of debt, dissolution or liquidation law or statute of the Federal Goverment or any state government, * * *; then, in any such event, the holder or holders of any of the Notes then outstanding or the Trustee may, at their or his option, declare such Notes to be, and thereupon such Notes shall become, forthwith, due and payable * * *"

The agreement also provided that the trustee was to be entitled to "reasonable compensation" for all the services he might render in the execution of the trusts and, in connection therewith, for his attorneys and counsel. This compensation was to constitute a prior lien on the trust estate and on all funds in the hands of the trustee.

In October 1954 the debtor, General Stores, filed a petition for arrangement under Chapter XI of the Bank-

ruptcy Act. However, instead of accelerating the debt because of this petition, Ruskin entered into a standby agreement with debtor, dated November 1, 1954, wherein he agreed that unless certain specified conditions occurred he would not foreclose prior to July 18, 1955. On March 7, 1955, the United States District Court for the Southern District of New York granted similar motions by a shareholder of debtor and by the Securities and Exchange Commission to dismiss debtor's petition unless it was amended so as to comply with the requirements of Chapter X of the Bankruptcy Act. *In re General Stores Corporation*, 129 F. Supp. 801 (S. D. N. Y. 1955). One month later we affirmed that decision, *General Stores Corporation* v. *Shlensky*, 222 F. 2d 234 (2 Cir. 1955). On August 17, 1955, Lewis J. Ruskin, as trustee under the collateral agreement, Lewis J. Ruskin individually, and Rexall Drug Company notified the debtor that they elected to declare the notes "forthwith due and payable because of an event of default occurring and existing under said collateral agreement by reason of the proceedings involving General Stores Corporation under Chapter XI of the Bankruptcy Act * * * commenced by General Stores Corporation and pending to this date in the United States District Court for the Southern District of New York." The Supreme Court of the United States affirmed our decision in *General Stores Corporation* v. *Shlensky* on March 26, 1956, 350 U. S. 462, and about one month later the debtor filed an amended petition asking for reorganization under Chapter X of the Bankruptcy Act. The district court approved the amended petition on May 1, 1956 and appointed a reorganization trustee.

This appeal stems from a petition filed by Ruskin, as trustee under the collateral agreement, seeking a determination of the amount of his claim on the unpaid notes, principal and interest, and of the amount of his lien for his

own and his attorneys' compensation. Ruskin claimed unpaid accrued interest at 4% to August 17, 1955, the date of the acceleration, and 6% thereafter. As compensation for his services as trustee Ruskin sought, at the rate of $35,000 per annum, $112,715.13 for the period October 18, 1954 to January 7, 1958. He also sought $180,000 as compensation for his attorneys. The court below decided that the post-default interest rate should remain at 4% rather than be increased to 6%; awarded Ruskin $24,215 as total compensation for his own services as collateral trustee, and granted attorneys' fees in the amount of $60,000. *In re General Stores Corporation*, 164 F. Supp. 130 (S.D. N.Y. 1958). The parties seem to agree that the debtor is solvent.

From these several determinations Ruskin appeals. The reorganization trustee, a stockholder of the debtor, and the Securities and Exchange Commission are all in opposition.

The Claim for Increased Interest

Although the contract between the parties explicitly provided that interest was to be at 6% rather than 4% after acceleration, the district court refused to allow the additional 2% interest. Relying upon *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156 (1946), *rehearing denied*, 329 U.S. 833 (1947), it held that Ruskin was not entitled to the benefit of his variable interest contract. We disagree with that holding.

In *Vanston* the Supreme Court disallowed an indenture trustee's claim against an insolvent debtor for interest on interest payments provided for in the trust indenture. The interest on interest accrued because the district court, pursuant to its administration of an equity receivership,

had ordered both the debtor and the receiver not to pay simple interest coupons that fell due under the indenture after the court assumed jurisdiction. Even if we agreed with the court below that a Supreme Court precedent dealing with an obligation for interest on interest falling due because of an equity court's stay order is equally applicable to a claim based upon a contractual provision for additional simple interest arising because the debtor sought the intervention of the bankruptcy laws, a question we need not now decide, we would still have to distinguish *Vanston* on what we find was a basic ground of that decision. In *Vanston* the debtor was insolvent, and in our case it appears the debtor is solvent. In *Empire Trust Co.* v. *Equitable Office Bldg. Corp.*, 167 F. 2d 346 (2 Cir. 1948), we avoided a resolution of the effect of *Vanston* upon parties to a reorganization proceeding involving a solvent corporation, but the issue is squarely before us now, and we hold that the Supreme Court did not intend that the principle enunciated by it in *Vanston*, in a contest between creditors, should be applied to a contest between a debtor's creditor and its stockholders.

The Supreme Court held in *Vanston* that since the district court had taken over the debtor's assets for the purpose of preserving and protecting them "pending a ratable distribution among all the creditors according to their interests as of the date the receivership began," it would have been contrary to that purpose and inequitable to the junior creditors to have junior creditors suffer and the mortgage bondholders enriched because of a stay order required to further the receivership aim. This result naturally followed from an examination of the usual rules that deal with simple interest claims in bankruptcy and in reorganization proceedings. *In re*

Wisconsin Cent. Ry. Co., 93 F. Supp. 579, 582 (D. Minn. 1950), *affirmed*, 191 F. 2d 822 (8 Cir. 1951), *cert. denied*, 342 U.S. 944 (1952). Thus, with respect to simple interest the Supreme Court said:

> "The general rule in bankruptcy and in equity receivership has been that interest on the debtor's obligations ceases to accrue at the beginning of proceedings. Exaction of interest, where the power of a debtor to pay even his contractual obligations is suspended by law, has been prohibited because it was considered in the nature of a penalty imposed because of delay in prompt payment—a delay necessitated by law if the courts are properly to preserve and protect the estate for the benefit of all interests involved * * * Courts have felt that it would be inequitable for anyone to gain an advantage or suffer a loss because of such delay." 329 U.S. at 163-64.

However, the Court carefully noted that this rule with respect to simple interest did not apply where the contest was between a creditor and stockholder of the debtor:

> "But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor." 329 U.S. at 164.

Since the result the Court reached stemmed from the equitable principles developed with respect to creditors' claims for simple interest in bankruptcy and equity receivership proceedings, and since it explicitly noted that these principles favored the debtor's creditors over its stockholders, the Court could hardly have meant that the rule it was declaring was to be applied in the case of a solvent debtor.

The district court decided that a result opposite to the one we reach here is dictated by that language in the *Vanston* opinion which states:

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor." 329 U.S. at 165.

It seems to us, however, that when this language is read in context it does not support the decision of the district court. It follows after a discussion of two differing situations.

> "To allow a secured creditor interest where his security was worth less than the value of his debt was thought to be inequitable to unsecured creditors * * * But where an estate was ample to pay all creditors and to pay interest even after the petition was filed, equitable considerations were invoked to permit payment of this additional interest to the secured creditor rather than to the debtor" 329 U.S. at 164.

and refers only to that discussion. See *In re Realty Associates Securities Corporation*, 163 F. 2d 387, 392 (2 Cir. 1947) (dissenting opinion of Clark, *J.*), *cert. denied*, 332 U.S. 836 (1947).

Of the many cases cited to us only two seem worthy of attention. *In re Schafer's Bakeries*, 155 F. Supp. 902 (E. D. Mich. 1957), relied upon by the district court, might be persuasive authority for the decision below if it were clear that that case involved a solvent debtor. However, there is nothing in the opinion to indicate that it did, and, since the plaintiff's claim for interest on interest was successfully contested by an "Unsecured Creditors' Committee," it

would seem that the debtor was actually an insolvent one. Certainly the court never pointed out whether the debtor there was solvent or insolvent, or discussed this distinction. On the other hand, in *In re International Hydro-Electric System*, 101 F. Supp. 222 (D. Mass. 1951), the Massachusetts district court carefully considered this very problem when it held:

> "[I]t is important that IHES is not at the present time insolvent. It has assets more than sufficient to meet all claims of its creditors. No benefit will be given to the debenture holders at the expense of any other class of creditors. The burden of this payment will fall entirely on the interest of the stockholders. They cannot complain that they are treated inequitably when their interest is cut down by the payment of a sum to which the debenture holders are clearly entitled by the express provisions of the trust indenture. The situation here differs from that in Vanston Bondholders Protective Committee v. Green * * * where the payment of interest on deferred interest payments was not allowd even though called for by the trust indenture, because the payment would have reduced the share of subordinate creditors in the reorganization of an insolvent corporation."

A variable interest provision in event of a stated default such as we have here is not a penalty, nor should it be considered unconscionable. Compare *Union Estates Co.* v. *Adlon Const. Co.*, 221 N. Y. 183 (1917) with *Newburger Morris Co.* v. *Talcott*, 219 N. Y. 505, 510 (1916). It can be beneficial to a debtor in that it may enable him to obtain money at a lower rate of interest than he could otherwise obtain it, for if a creditor had to anticipate a possible loss in the value of the loan due to his debtor's bankruptcy or

reorganization, he would need to exact a higher uniform interest rate for the full life of the loan. The debtor has the benefit of the lower rate until the crucial event occurs; he need not pay a higher rate throughout the life of the loan.

Undoubtedly the debtor filed its petition under Chapter XI because it believed it beneficial to itself to do so, and in a case such as this, where there is no showing that the creditor entitled to the increased interest caused any unjust delay in the proceedings, it seems to us the opposite of equity to allow the debtor to escape the expressly-bargained-for result of its act.

Ruskin's Claim for Compensation Under the Collateral Agreement

Article VIII, Section 1(2) of the collateral agreement provided as follows:

> "Section 1. The Trustee accepts the Trust of this Collateral Agreement upon the following terms and conditions to which General and the holder and holders of the Notes secured hereby agree:
>
> • • • • •
>
> "(2) The Trustee shall be entitled to reasonable compensation for all services rendered in the execution of the trusts hereby created, to be paid, for services prior to the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof, by the holders of the Notes ratably, and for services after the existence of one or more of the events of default mentioned in Section 1 of Article VI hereof, by General; and for such payment, the Trustee shall have a lien on the Trust Estate and all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes."

Pursuant to this section Ruskin claims $112,715.13 from debtor for his services from October 18, 1954 computed to January 7, 1958, at $35,000 per annum. These services allegedly consisted of directing the policy of closing small volume or marginal stores and opening large volume self-service stores; directing the acquisition of the Wright and Lawrence chain of drug stores; directing the development of "system stores" and the placing of higher profit margin items in the rack jobbing operations in the grocery chains when the profits of the so-called "Huron division" servicing these grocery chains began to diminish because of direct drug purchases by these chains; directing the weekly meetings of "operating committees" wherein Ruskin counseled and guided the company executives; making personal visits to the offices of the subsidiaries in Chicago ten or eleven times a year for four days at a time; while at home in Arizona, keeping in constant contact with the executives and studying reports sent to him; and generally keeping in touch with industry trends and directing the companies' policies. Looking at the question of compensation in terms of what it found were the requirements of Article VIII, Section 1(2) of the collateral agreement—i.e., that services be rendered in the "execution of the trusts" and the compensation be "reasonable"—the district court allowed Ruskin a total of $24,215. In an order entered July 1, 1958, upon what was in effect a petition for a rehearing, the district court reaffirmed this allowance.

The fixing of allowances is not only the most thankless task in all of the problems of judicial reorganization, it is also the most delicate. *Scribner & Miller* v. *Conway*, 238 F. 2d 905 (2 Cir. 1956); *Finn* v. *Childs Co.*, 181 F. 2d 431 (2 Cir. 1950). And see *Surface Transit, Inc.* v. *Saxe, Bacon & O'Shea*, 2 Cir., 266 F. 2d 862. Consequently an

appellate court would be less than wise if it did not rely heavily for guidance in such matters upon the SEC which functions as a responsible and disinterested public agency, *Scribner & Miller* v. *Conway, supra; Finn* v. *Childs Co., supra,* and the district court whose intimate knowledge of the whole reorganization gives it a peculiar advantage, *Johnson* v. *Carolina Scenic Stages,* 242 F. 2d 263 (4 Cir. 1957); *Finn* v. *Childs Co., supra; Milbank, Tweed & Hope* v. *McCue,* 111 F. 2d 100 (4 Cir. 1940). In this case the rate of compensation recommended by the SEC would have entitled Ruskin to a sum somewhat less than $20,000. Since this is approximately $5,000 less than the district court awarded him it would require a strong showing by Ruskin in order for us to award him an additional sum, or to remand this case to the district court for reconsideration. While the district court pointed out that "the services of the collateral trustee to some extent contributed to the stabilization in management of the two subsidiaries concerned," and that "in part the success of these corporations during the period in question came from attention which the collateral trustee's control effected," it found that there was no convincing evidence to show that all or even a large portion of Ruskin's activities were necessary to properly execute the purpose of his trust—i.e., the purpose of seeing that the note holders were properly secured. Also the court found that there was no substantial evidence to indicate that an executive capable of conducting the necessary supervision of the two subsidiaries was not in their employ, or could not have been hired by them, and therefore services rendered by Ruskin for which he sought compensation as a trustee were unnecessary. After an examination of the record we are not convinced that the district court's findings and award are clearly erroneous.

Claim for Compensation for Attorneys' Fees

Ruskin's last contention on this appeal is that the district court did not allow him sufficient compensation for attorneys' fees. His claim for $180,000 for the period between October 15, 1954 and December 13, 1957 was predicated under Section 1(3) of Article VIII of the collateral agreement. That section provides:

> "The Trustee may employ agents, attorneys and counsel in the execution of said trusts, who may also be the attorneys and counsel of the holder or holders of said Notes, and of Ford and Stineway, or their successors, or any one or more of them, and the reasonable compensation of the Trustee's attorneys and counsel and of any other person as the Trustee may employ in the administration and management of the trusts hereunder, and all other reasonable expenses necessarily incurred or actually disbursed hereunder, General agrees to pay to the Trustee on demand; and for such payment, the Trustee shall have a lien on the Trust Estate, and on all funds in the hands of the Trustee, in priority to the rights and claims of the holder or holders of said Notes."

$80,000 of the claim was for the Chicago law firm of Ruskin & Rosenbaum and $100,000 was for the New York firm of Paul, Weiss, Rifkind, Wharton & Garrison. After careful consideration of the items of Ruskin's claim and upon the advice of the SEC, the district court allowed Ruskin & Rosenbaum the sum of $5,000 for the period between October 15, 1954 and April 30, 1956; and made a joint award of $55,000 for the combined services of Ruskin & Rosenbaum and Paul, Weiss, Rifkind, Wharton & Garrison for the period from on or about April 30, 1956 to

Ruskin contends that the district court committed error in making these awards because it applied a wrong standard in evaluating counsel's services. He argues that the court rewarded these two firms only for services that brought forth actual benefits accruing to the debtor's estate rather than for the services which, pursuant to contract, they rendered to him as collateral trustee. We find nothing in the district court's opinion which would indicate that it applied the standard which Ruskin contends it did apply. Rather, all the indications we find are to the contrary. Thus:

> "There is inadequate proof to indicate that the extensive time involved in preparing lengthy briefs was necessary for the protection of the collateral trustee and his trust * * *" 164 F. Supp. at 145.
>
> "Here, we are concerned with a trust in which the fundamental premise on which the allowance is made must be based upon what is fair and reasonable under the circumstances of the particular case. The necessity of the services depends in the first instance upon whether or not the proceedings initiated were reasonably essential to the protection of the trust. The amount allowed should bear a reasonable relationship to the demands of the situation." 164 F. Supp. at 146.

The district court fully realized that it was making an award under a contract between the debtor and Ruskin. It was also aware, and rightly so, that the award would be paid from a reorganization debtor's assets. *Newman & Bisco* v. *Realty Associates Securities Corp.*, 173 F. 2d 609 (2 Cir. 1949); *Butzel* v. *Webster Apartments Co.*, 112 F. 2d 362 (6 Cir. 1940). Consequently, in order to avoid that "vicarious generosity" which the courts have so often deplored, *Finn* v. *Childs Co.*, 181 F. 2d 431 (2 Cir.

1950), it considered in detail the services rendered by the two firms. In making the allowances it found and properly took into account that there was some duplication of services rendered by the New York and Chicago firms, *Finn* v. *Childs Co., supra; Newman & Bisco* v. *Realty Associates Securities Corp., supra;* that certain of the services rendered related to matters that did not need legal action or require advice of counsel; that the issues dealt with by counsel were not complex, *Newman & Bisco* v. *Realty Associates Securities Corp., supra; In re McGrath Mfg. Co.*, 95 F. Supp. 825 (D. Neb. 1951); that approximately half of the recorded time spent by the New York firm was contributed by a junior associate, *Finn* v. *Childs Co., supra;* that during the period for which compensation was being sought for them by the collateral trustee, the Chicago firm was receiving an annual retainer of $15,000 from Ford Hopkins.

Ruskin does not demonstrate that these findings of the district court were clearly erroneous. Nor does he show that the court's award made on the basis of those findings, an award in accord with the recommendation of the SEC, was an improper one. With respect to SEC recommendations in such matters, we said in *Finn* v. *Childs Co., supra*, at page 438:

> "[T]he figures presented by the SEC are not 'mere casual conjectures,' but are 'recommendations based on closer study than a district judge could ordinarily give to such matters.' Frank, supra, 18 N. Y. U. L. Q. Rev. 317, 1941. We agree with District Judge Kirkpatrick's apt statement 'that the Commission is about the only wholly disinterested party in the proceeding and that, while it may not be entirely familiar with "problems of making both ends meet in a law office" referred to by counsel, its experience has made it

> thoroughly familiar with the general attitude of the Courts and the amounts of allowances made in scores of comparable proceedings.' In Re Philadelphia & Reading Coal & Iron Co., D. C. E. D. Pa., 61 F. Supp. 120, 124."

We cannot say that here the broad discretion with which the district judge, in the first instance, must of necessity be empowered in this type of case, see *Johnson* v. *Carolina Scenic Stages*, 242 F. 2d 263 (4 Cir. 1957), has been abused.

Accordingly, we affirm that portion of the district court's order disposing of the claims of the collateral trustee for compensation for himself and for allowance with which to compensate his attorneys; we reverse the portion of that order that denies interest on the unpaid installment notes at a rate in excess of 4% per annum from August 17, 1955 forward; and the cause is remanded for further proceedings not inconsistent with this opinion.

WASHINGTON, *Circuit Judge* (concurring in part and dissenting in part:

I would affirm the District Court's judgment in its entirety. As to the variable interest claim, I think the District Court correctly viewed the matter as one for the application of equitable principles, whether the corporation was solvent or insolvent. It carefully weighed the equities, see 164 F. Supp. 130, at 136-140, and concluded that the extra interest should not be allowed. I do not think it abused its discretion, and would not disturb its holding.